

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

SUHAIL NAJIM)
ABDULLAH AL SHIMARI *et al.*,)
Plaintiffs,)

v.)

CACI PREMIER TECHNOLOGY, INC.)
Defendant.)

Case No. 1:08-cv-827 (LMB/JFA)

PUBLIC VERSION

CACI PREMIER TECHNOLOGY, INC.,)
Third-Party Plaintiff,)

v.)

UNITED STATES OF AMERICA, and)
JOHN DOES 1-60,)
Third-Party Defendants.)

**PLAINTIFFS' OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY,
INC.'S MOTION TO DISMISS BASED ON THE STATE SECRETS PRIVILEGE**

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Plaintiffs respectfully submit this opposition to the motion by Defendant CACI Premier Technology, Inc. (“CACI”) to dismiss based on the state secrets privilege, CACI’s *fifteenth motion seeking dismissal* filed in this case.

PRELIMINARY STATEMENT

CACI’s concurrent filing of this motion to dismiss along with a motion for summary judgment presents a curious contradiction. On the one hand, CACI contends that it cannot fairly defend this case without access to certain privileged information. On the other hand, it contends that, even without the classified information that it seeks, the record entitles it to judgment as a matter of law. CACI cannot have it both ways. Indeed, CACI should have it neither way. CACI has received voluminous evidence it may try to use to mount a defense and only a small amount of non-critical evidence has been withheld by the government under the state secrets privilege; at the same time, as Plaintiffs demonstrate in their opposition filed today to CACI’s summary judgment motion, the record is rife with disputed issues of fact that preclude summary judgment.

If CACI truly believed that it needed access to the privileged information it seeks, one would expect it to have challenged the applicability of the state secrets privilege, as litigants routinely do when faced with purported prejudice from such withholding. But CACI has never bothered to do so because its true concern is not prejudice. Instead, it views the assertion of the privilege as an opportunity to manufacture another issue that it can leverage to seek dismissal. The purported prejudice issue that CACI has constructed, however, fails on the merits.

Since the Abu Ghraib prison scandal, CACI has gained access to a wealth of evidence potentially relevant to the parties’ claims and defenses in this litigation. It has obtained nearly *61,000 pages* of documents and *220 native files* from the United States. It has elicited testimony

from **27 witnesses**, including Plaintiffs, individuals with whom they allegedly interacted at Abu Ghraib, military police (“MPs”), and the author of a government report implicating CACI in detainee abuse. CACI also has been able to leverage the mountains of evidence generated in its own contemporaneous internal investigation, which is unavailable to Plaintiffs, to pursue investigative leads and prepare for the depositions of pseudonymous witnesses, including a CACI interrogator whose identity CACI learned prior to his deposition.

Despite all this evidence, CACI has repeatedly cried foul because the United States has asserted privilege over a small amount of information that is not legally relevant to CACI’s defenses. The government’s privilege assertion over documentary evidence implicates only 300 of the nearly 61,000 pages of documents that the United States produced, or ***less than 0.5% of the government’s production***. Of the information withheld, the vast majority concerns non-material information such as ID numbers associated with Plaintiffs, information regarding the date and location of their arrest by Coalition Forces, and the identities of detainees other than Plaintiffs. The United States has also represented that none of the redacted information relates to conduct not authorized by the Army Field Manual, which prohibits the very torture and cruel, inhuman, or degrading treatment (“CIDT”) on which Plaintiffs’ claims are predicated.

With respect to witness testimony, the government’s privilege assertion covers only the names, visual representations and other information that could reveal the identity of interrogation personnel and only to the extent those personnel were assigned to interrogate specific detainees, including Plaintiffs. CACI was given free rein to question witnesses regarding (1) their status as either a CACI or Army employee while at Abu Ghraib; (2) their participation in and knowledge of detainee abuse at Abu Ghraib, including with respect to Plaintiffs; (3) the nature of their interactions with MPs; and (4) purported military oversight of the interrogation process.

CACI's request for dismissal should be denied for numerous reasons. *First*, CACI does not *need* the purportedly privileged information to defend itself in this litigation, nor is this information necessary to adjudicate the theories of liability pursued by Plaintiffs. CACI has access to ample non-privileged evidence that it could seek to introduce to defend against the merits of Plaintiffs' claims. *Second*, certain of CACI's purported defenses, such as derivative immunity and borrowed servant, are not viable and in no way turn on the limited evidence withheld in this case. *Third*, the government's assertion of the privilege does not prevent CACI from presenting potentially favorable witness testimony at trial or otherwise disadvantage CACI in any so-called credibility battle. *Fourth*, CACI has access to sufficient non-classified information that it could seek to introduce in order to contest the findings of the Taguba and Jones/Fay Reports. *Fifth*, CACI should not be granted dismissal where any purported prejudice from the government's privilege assertion affects *Plaintiffs* as much as, and likely more than, it does CACI. In sum, due process does not guarantee any litigant access to all potential evidence or the ability to present every theoretically possible defense, and CACI has not identified a single authority that would support this unprecedented position. For all these reasons, CACI's motion should be denied.

BACKGROUND

A. CACI Obtains Extensive Evidence Potentially Relevant to the Parties' Claims and Defenses from the United States

1. Documentary Evidence

Since the United States became a party to this proceeding, it has produced 60,843 pages of documents and 220 native files related to Plaintiffs' detention at Abu Ghraib and the detainee abuse that occurred there. (Buszin Decl. (hereinafter, "Decl.") Ex. 1.) This production was

made, after de-classification review, with only a small amount of information withheld because of the United States' assertion of the state secrets privilege. As former Secretary of Defense Mattis explained, "DoD has disclosed to the parties in this litigation extensive portions of the documents at issue, with redactions used narrowly and sparingly." (*Id.* Ex. 2 ¶ 3.) That assertion bears out. The United States' invocation of the state secrets privilege, including with respect to information indisputably unrelated to the parties' claims and defenses, implicates only about 300 of the nearly 61,000 pages of documents that the United States produced. (*Id.*; *id.* Ex. 1.) More importantly, CACI has failed to demonstrate that anything withheld is crucial to any plausible defense.

The detainee files associated with Plaintiffs were among the documents produced by the United States with minimal redaction. These files contain material concerning Plaintiffs' arrest, detention, interrogations, and release. A review of these materials reveals the following:

Plaintiff Al-Ejaili: The detainee file associated with Plaintiff Al-Ejaili was produced in its entirety without redaction. (*Id.* Ex. 3; *id.* Ex. 4.)

Plaintiff Al Zuba'e: The detainee file associated with Plaintiff Al Zuba'e was produced with approximately 19 unique redactions,¹ almost all of which concern information unrelated to interrogations or Al Zuba'e's treatment while in detention.² Redacted material mostly comprises information such as Al Zuba'e's date of capture, a recommended release date, and portions of his internment serial number ("ISN"). Of the three sets of interrogator notes found in the file, two were produced without any redaction. (*Id.* Ex. 5 at AS-USA-035415 – 17, AS-USA-035424 –

¹ In identifying unique redactions, Plaintiffs have not counted each instance where the same information is redacted in different parts of a given detainee file. Where it was not evident on the face of a document that a redaction was duplicative of other redactions, Plaintiffs counted it as a unique redaction.

² (*See* Decl. Ex. 5.) Pages reflecting these unique redactions include AS-USA-035419, AS-USA-035430 – 32, AS-USA-035438, AS-USA-054169, and AS-USA-054188 – 90.

25.) Interrogator notes related to the third, and final, documented interrogation of Al Zuba'e were produced with minimal redaction, mostly concerning an assessment of Al Zuba'e's attitude during the interrogation and recommendations for future interrogations. (*Id.* at AS-USA-035431 – 32.) There is no evidence of any written interrogation plans anywhere in the file, nor has the United States suggested that any such plan was withheld.

Plaintiff Rashid: The detainee file associated with Plaintiff Rashid was produced with approximately 21 unique redactions.³ The majority of the redactions in Rashid's file similarly concern information unrelated to interrogations or Rashid's treatment while in detention. Such information includes portions of the ISN associated with Rashid as well as information regarding his birthplace, nationality, date of arrest by Coalition Forces, and place of arrest. Among the documents produced in this file were interrogator notes associated with the sole documented interrogation of Rashid. Consistent with the government's overall position regarding classified information, the only information redacted from these interrogator notes is the name of the interpreter present for the interrogation. (*Id.* Ex. 6 at AS-USA-052178 – 79.) There is no evidence of any written interrogation plans anywhere in the file, nor has the United States suggested that any such plan was withheld.

Plaintiff Al Shimari: The detainee file of Plaintiff Al Shimari was also produced in substantially unredacted form,⁴ with most of the redacted material concerning information unrelated to interrogations or Al Shimari's treatment while in detention. Such information

³ (Decl. Ex. 6.) Pages reflecting these unique redactions include AS-USA-052174, AS-USA-052178, AS-USA-052185 – 86, AS-USA-052196, AS-USA-052199, AS-USA-052204, AS-USA-052209, AS-USA-052213, AS-USA-052215, AS-USA-052217, AS-USA-052231, AS-USA-052245, and AS-USA-052251.

⁴ Because of the size of Al Shimari's detainee file and the large number of seemingly duplicative pages and redactions, Plaintiffs have been unable to identify the number of unique redactions in the version of the detainee file that was produced.

includes portions of the ISN associated with Al Shimari, identifying information related to interrogation personnel and detainees who have no connection to Al Shimari, information regarding Al Shimari's birthplace and nationality, and information related to the date and place of his arrest by Coalition Forces. Most of the interrogation-related documents—such as the interrogator notes related to Al Shimari's sole documented interrogation—were produced with few redactions, if any.⁵ (*See id.* Ex. 7.) The United States has also represented that “none of the withheld material discusses or describes the use of enhanced interrogation techniques or techniques not authorized by Army Field Manual (“FM”) 34-52. (*Id.* Ex. 2 ¶ 3.)

Also among the documents produced by the United States were the Article 15-6 Investigation of the 800th Military Police Brigade (“Taguba Report”) and the Article 15-6 Investigations of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (“Jones/Fay Report”), along with voluminous annexes to those reports. These documents were similarly produced with minimal redactions intended to protect against the disclosure of information the government claims is classified. CACI ultimately sought to compel the government to disclose redacted information in thirteen witness statements found in an annex to the Jones/Fay Report and one statement found in an annex to the Taguba Report. *See* Opp. Br. of the United States, Ex. 3 at 6-7 (Dkt. 992). These challenged redactions implicated only nineteen of the thousands of pages comprising the Generals' Reports and related annexes. *Id.* These pages were produced with no information redacted except for the names of certain detainees (other than Plaintiffs) and interrogators. (Decl. Ex. 8; *id.* Ex. 2 ¶ 3.)

⁵ Should the Court so request, Plaintiffs are prepared to submit the detainee file associated with Plaintiff Al Shimari for *in camera* review.

2. Witness Testimony

In addition to the documents produced in discovery, Plaintiffs and CACI have collectively deposited 27 witnesses who may have information relevant to the parties' claims and defenses. Among others, these witnesses have included: (1) all four Plaintiffs; (2) multiple former MPs who were convicted in courts martial on charges related to detainee abuse at Abu Ghraib, some of whom testified [REDACTED] [REDACTED] (Decl. Ex. 9 at 71:11 – 82:9, 84:6 – 85:8, 90:19 – 92:24; *id.* Ex. 10 at 24:5 – 25:11, 35:17 – 38:12, 49:22 – 50:11); (3) an Army interrogator who witnessed [REDACTED] [REDACTED] (*id.* Ex. 11 at 18:8 – 20:2); (4) General Taguba; and (5) the interrogators, analysts, and linguists whom the United States has been able to identify as having participated in the documented intelligence interrogations of Plaintiffs.⁶ Because of the risk that classified information could be disclosed during the depositions of interrogation personnel and linguists who interacted with Plaintiffs, the United States produced these witnesses pseudonymously and instructed the witnesses not to answer questions that risked revealing their identity.

Despite the restrictions imposed on the pseudonymous depositions, CACI learned of the identity of at least one of the two pseudonymous CACI interrogators (“CACI A”) prior to his deposition. CACI’s counsel subsequently met with CACI A for more than an hour to prepare for his deposition, during which they discussed the questions that would likely be asked at the deposition and CACI A’s anticipated answers. (*Id.* Ex. 13 at 121:10 – 123:1.) Despite CACI’s

⁶ The only such witness who is potentially available for deposition and yet to be deposed is CACI Interrogator G (“CACI G”). *See* Oct. 15, 2018 Status Report (Dkt. 956). One of the pseudonymous interrogators (Army Interrogator D) could not be deposed as the United States was unable to locate this witness. *See* June 29, 2018 Status Report, at 2-3 (Dkt. 865). The government also learned that one of the pseudonymous interpreters is deceased. (Decl. Ex. 12.)

knowledge regarding the identity of CACI A, the United States refused to disclose that information to Plaintiffs and it prevented Plaintiffs from asking CACI A questions that it believed might reveal his identity or the nature of his relationship with CACI. (*Id.* Ex. 14; *e.g.*, *id.* Ex. 13 at 10:16 – 11:1, 122:4 – 17, 128:4 – 17.)

Over the course of the pseudonymous depositions, the government permitted witnesses to provide testimony about their experiences at Abu Ghraib and with Plaintiffs regarding:

- Whether they worked for the Army or CACI while at Abu Ghraib;
- Whether they ever directed MPs to subject detainees to certain conditions;
- Whether they recognized Plaintiffs;
- Their knowledge regarding what occurred during interrogations of Plaintiffs;
- Their knowledge regarding detainees being forced to wear female underwear;
- Their knowledge regarding detainees being subjected to forced nudity;
- Their knowledge regarding the use of stress positions and sleep deprivation in connection with interrogations;
- Their knowledge regarding detainees being doused with cold water;
- Their knowledge regarding the beating of detainees;
- Their knowledge regarding the use of dogs in connection with interrogations;
- Their knowledge regarding detainees being forced to kneel on sharp rocks;
- Their knowledge regarding detainees being deprived of food;
- Their knowledge regarding detainees being subjected to sexual abuse;
- Their knowledge regarding the forcible shaving of detainees;
- Their knowledge regarding detainees being subjected to sensory deprivation and solitary confinement;
- Their knowledge regarding the circumstances under which detainees were brought to interrogations and returned to their cells afterward;

- Their knowledge regarding interrogator access to and use of weapons in connection with interrogations;
- Their preparation for interrogations and any military oversight of the interrogation process;
- Their knowledge regarding the interrogation rules of engagement; and
- Their knowledge regarding any detainee abuse that they witnesses at Abu Ghraib.⁷

In addition, the United States permitted many of the pseudonymous witnesses to disclose information that could potentially be relevant to their credibility. Such information included (1) whether the witness had ever been court-martialed or subjected to nonjudicial punishment; (2) whether the witness was ever disciplined or reprimanded by the Army for anything that happened at Abu Ghraib; (3) whether the witness had ever been convicted of a crime; and (4) whether the witness had ever received any medals or awards while in the army.⁸

B. The Government Prevents Both Plaintiffs and CACI From Discovering a Small Amount of Information Because of the State Secrets Privilege

The United States has formally invoked the state secrets privilege three times in this case as a basis for not disclosing certain information to Plaintiffs or CACI. First, the United States invoked the privilege and refused to disclose the identities and visual representations of the interrogators and analysts who, according to government records, interrogated Plaintiffs while they were in U.S. military custody at Abu Ghraib. (Decl. Ex. 17 ¶ 3.) Second, the United States invoked the privilege and refused to disclose the same information regarding interpreters who potentially interacted with Plaintiffs. (*Id.* Ex. 18 ¶ 3.) Third, the United States asserted the

⁷ (*See generally* Decl. Ex. 13; *id.* Ex. 15; *id.* Ex. 16.) Should the Court so request, Plaintiffs are prepared to submit the transcripts associated with the depositions of each pseudonymous witness for *in camera* review.

⁸ (*See, e.g., id.* Ex. 15 at 18:9 – 19:7; *id.* Ex. 16 at 17:14 – 19:8.)

privilege over certain information located in the detainee files associated with Plaintiffs and certain annexes to the Generals' Reports, as described above. (*Id.* Ex. 2 ¶ 3; Opp. Br. of the United States, at 6-7 (Dkt. 992).) The United States clarified, however, that much of the privileged information in the detainee files and report annexes was unrelated to Plaintiffs or the defenses in this litigation. (Decl. Ex. 2 ¶ 3.) Such information included:

- The names and/or visual representations of individuals who conducted or supported the questioning of specific detainees, *other than plaintiffs*, at Abu Ghraib or other detention facilities in Iraq;
- The names or identities of specific detainees, *other than plaintiffs*, in connection with the names and/or visual representations of individuals who conducted or supported the questioning of those detainees;
- The alpha-numeric portion of the ISNs assigned to Plaintiffs⁹; and
- Information relating to specific intelligence-gathering efforts and results, *unrelated to plaintiffs*, as well as information relating to non-DoD intelligence sources.

(*Id.*)

Each time that the government has asserted the state secrets privilege, CACI has made no attempt to challenge the merits of that assertion.¹⁰ *See, e.g.*, CACI Reply Br. (Dkt. 785); CACI Reply Br. (Dkt. 882); CACI Reply Br. (Dkt. 993). Instead, CACI has repeatedly argued that the successful invocation of the privilege requires the dismissal of Plaintiffs' claims under the theory that CACI cannot fairly defend itself without the privileged information. CACI Reply Br., at 11-16 (Dkt. 785); CACI Reply Br., at 16-20 (Dkt. 882); CACI Reply Br., at 6-16 (Dkt. 993).

⁹ This portion of the ISN would reveal only the country that detained Plaintiffs, the location where they were detained, and the country of Plaintiffs "allegiance." (*Id.* Ex. 2 ¶ 5.)

¹⁰ After Judge Anderson upheld the government's assertion of the state secrets privilege over the identity of interrogation personnel, CACI lodged no objection to this aspect of his decision. *E.g.*, CACI Objections, at 13 (Dkt. 805) ("CACI PT has not, and does not, challenge or dispute Secretary Mattis's considered opinion."). As to Judge Anderson's most recent ruling upholding the government's assertion of the privilege over certain documents, CACI failed to file any objections.

C. CACI Retains Exclusive Access to Evidence Relevant to This Case from Its Internal Investigation

In addition to the information disclosed in discovery, CACI is in sole possession of voluminous information from its extensive internal investigation regarding its involvement in the detainee abuse that occurred at Abu Ghraib. As recounted in *Our Good Name*—a nearly 800-page long book concerning CACI’s response to the scandal that was authored by CACI’s then-CEO and current Chairman, Dr. J. Phillip London¹¹—CACI’s investigation sought to uncover “to the greatest extent possible, what had transpired” at Abu Ghraib.¹² (Decl. Ex. 24 at 53.) Questions that CACI sought to answer included whether “any CACI people participated in abuses like those shown on CBS and described by [General] Taguba”; whether “any of CACI’s people been aware of any misconduct and what, if anything, had they done about it”; and whether “someone who was employed by CACI had in some way been responsible for the abuses alleged.” (*Id.*) One particular focus for CACI was learning “everything they could about [CACI Interrogator Steve] Stefanowicz,” whom General Taguba had “urged” be fired for his involvement in detainee abuse. (*Id.* at 54.)

CACI’s response to revelations of detainee abuse was “personally managed” by Dr. London, (*id.* Ex. 19 at 89:4 – 9), and its investigation “was handled exclusively by outside legal counsel at Steptoe & Johnson,” the law firm representing CACI in this litigation. (*Id.* Ex. 24 at 395.) In connection with the investigation, “[t]housands of hours were devoted to a top-to-bottom examination of company records to organize the facts” and “enable CACI’s decision-

¹¹ CACI authorized the publication of *Our Good Name* and its corporate designee has testified that the company stands behind what is said in the book. (*Id.* Ex. 19 at 71:20 – 72:10.)

¹² Moreover, CACI had been receiving [REDACTED]. (*Id.* Ex. 20; *id.* Ex. 21; *id.* Ex. 22; *see also id.* Ex. 23.)

makers to learn for themselves whether any of the company’s people had done any wrong or any of its management systems had failed.” (*Id.* at 7.) Counsel at Steptoe also “conducted interviews with the majority of the CACI interrogators, as well as other CACI employees who served at Abu Ghraib.” (*Id.* at 396.) The company was able to interview Steve Stefanowicz, Tim Dugan, and Dan Johnson—the three CACI employees specifically implicated in detainee abuse by the Taguba and Jones/Fay Reports. (*Id.* Ex. 19 at 89:17 – 90:25.)

Based on this investigation, CACI concluded that “no one associated with CACI participated in any behavior that remotely approached the kinds of heinous acts depicted in the Abu Ghraib abuse photos.” (*Id.* Ex. 24 at 20.) It publicly announced the findings of its investigation in a press release, a copy of which was delivered by hand to every member of Congress. (*Id.* at 116; *id.* Ex. 25.) In December 2012, Plaintiffs’ requested that CACI produce all documents concerning its purportedly exonerating investigation. (*Id.* Ex. 26 at 8.) CACI refused, claiming litigation privileges. (*Id.* Ex. 27 at 5-6.)

CACI knows and presumptively has access to its employees who worked at Abu Ghraib and its executives who supervised them. As recently as 2018, CACI provided hired counsel to represent one of its Abu Ghraib interrogators, CACI A, in his deposition in this case, and CACI’s counsel of record personally prepped that witness for his deposition. (*Id.* Ex. 13 at 113:15 – 21, 121:10 – 123:1.)

ARGUMENT

I. CACI SEEKS PURPORTEDLY PRIVILEGED INFORMATION NOT TO DEFEND AGAINST THE MERITS OF PLAINTIFFS’ ALLEGATIONS BUT RATHER TO DENY PLAINTIFFS A FORUM FOR THEIR CLAIMS

CACI’s claim that it cannot properly defend itself without access to the limited information withheld by the government represents a thinly veiled strategy to weaponize the

state secrets doctrine in an effort to transform an evidentiary issue that affects both Plaintiffs and CACI equally into an absolute defense that would allow CACI to evade liability.

If CACI truly needed the information at issue, one would expect it to at least challenge the government's assertion that the information is privileged. *See El-Masri v. Tenet*, 437 F. Supp. 2d 530, 536 (E.D. Va. 2006) (noting that courts cannot "blindly accept" the Executive Branch's assertion that "the claimed secrets deserve the protection of the privilege"). That is precisely what the plaintiffs did in *El-Masri* and the defendants did in *Salim v. Mitchell*—a lawsuit against government contractors who were sued for their role in aiding and abetting torture. *See In re Mitchell & Jessen*, No. 16-MC-0036, Dkt. 76 at 9, 11, 15 (E.D. Wash.) (arguing that depositions of CIA personnel would not harm national security). But CACI has made no such attempt, even though the events at issue are fifteen years old and the Mattis Declarations contain a number of contestable assertions. In a case like this, where CACI has adopted a hyper-aggressive defense characterized by dozens of offensive motions, its decision to "blindly accept" the validity of the government's asserted privilege is telling.

II. THE DRASTIC REMEDY OF DISMISSAL IS UNWARRANTED BECAUSE CACI CAN DEFEND ITSELF WITHOUT RELYING ON INFORMATION COVERED BY THE STATE SECRETS PRIVILEGE

A. CACI Must Establish That Its Main Defenses Against Plaintiffs' Claims Require the Disclosure of Classified Information

Dismissal based on an invocation of the state secrets privilege is a "drastic remedy that has rarely been invoked." *Fitzgerald v. Penthouse Int'l*, 776 F.2d 1236, 1242 (4th Cir. 1985). As the Fourth Circuit and other courts have made clear, when the state secrets privilege is successfully invoked, "the result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence." *In re Sealed Case*, 494 F.3d 139, 144-45 (D.C. Cir. 2007) (alterations

omitted); accord *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 270-71 (4th Cir.), reversed en banc on other grounds, 30 Fed. R. Serv. 2d (Callaghan) 1274 (1980).¹³ This is the usual result because “[t]he death of a witness . . . is not an occasion to dismiss complaints on the basis of speculation about what the lost evidence might have suggested.” *In re Sealed Case*, 494 F.3d at 151. “Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted.” *Fitzgerald*, 776 F.2d at 1244.

CACI nevertheless seeks this extreme remedy based on only one of the three grounds permitting dismissal: that it cannot “properly defend” itself without disclosing privileged information. See CACI Br. at 2 (Dkt. 1042); see also *Abilt v. CIA*, 848 F.3d 305, 313-14 (4th Cir. 2017).¹⁴ But courts cannot dismiss an entire case under the “proper defense” exception solely because privileged information may be *relevant* to a purported defense. *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001). Instead, dismissal is appropriate only where “the main avenues of defense available would *require* [the disclosure of] privileged information.” *Abilt*, 848 F.3d at 316 (emphasis added); accord *El-Masri v. United States*, 479 F.3d 296, 310 (4th Cir. 2007) (“[T]he central facts or very subject matter of a civil proceeding, for purposes of our dismissal analysis, are those facts necessary to litigate it.”).

¹³ Sitting en banc, the Fourth Circuit ultimately held that dismissal was warranted after reviewing an affidavit from the Secretary of the Navy and determining that any attempt by the plaintiff to establish a prima facie case would necessarily threaten the disclosure of state secrets. The United States has not taken that position in the present case.

¹⁴ The other two narrow circumstances where invocation of the privilege warrants dismissal are where (1) the plaintiff cannot prove a prima facie case without relying on privileged evidence, and (2) privileged evidence is so central to the litigation that any attempt to proceed with the case presents an unjustifiable risk of disclosure. *Abilt*, 848 F.3d at 313-14. There is no dispute that Plaintiffs can prove a prima facie case on their claims of conspiracy and aiding and abetting without relying on classified information. Moreover, as illustrated by the pseudonymous depositions conducted to date, this is not a case where privileged information is so central to the litigation that it cannot proceed without presenting an unjustifiable risk of disclosure.

When evaluating necessity, courts should not confuse potentially favorable evidence with necessary evidence. *See Farnsworth Cannon, Inc.*, 635 F.2d at 271 (“[I]f plaintiff has sufficient admissible evidence to enable a factfinder to decide in its favor without resort to the privileged material, then the potential helpfulness to plaintiff’s case of other secret, inadmissible information is not grounds for dismissal.”). If there is non-privileged evidence that a defendant can rely on to make out a defense, dismissal is improper. *E.g., DTM Research*, 245 F.3d at 334; *In re Sealed Case*, 494 F.3d at 147; *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

In seeking dismissal, CACI espouses an extraordinary and incorrect interpretation of the law that disregards and distorts Fourth Circuit precedent. In particular, CACI ignores the Fourth Circuit’s decision in *DTM Research*—a case in which a defendant similarly tried to transform the government’s invocation of the state secrets privilege into a golden ticket to a dismissal. *DTM Research* involved claims brought by a data mining company against AT&T for misappropriation of trade secrets. *DTM Research*, 245 F.3d at 329. AT&T sought to establish that the purported trade secrets concerned technology that DTM had actually misappropriated from the United States. *Id.* In pursuit of supporting evidence, AT&T sought discovery from the United States. *Id.* at 330. The discovery authorized by the court was “severely circumscribed,” however, after the United States invoked the state secrets privilege. *Id.* Pursuing the same argument that CACI raises here, AT&T then moved for summary judgment on the ground that the district court’s ruling “prevented [it] from freely and fairly defending the claims brought against it.” *Id.* The district court denied that motion but allowed AT&T to seek an interlocutory appeal. *Id.*

The Fourth Circuit also rejected AT&T’s arguments. *Id.* at 335. It reasoned that the privileged evidence was “potentially relevant to some aspects of AT&T’s defense” but that its

importance was “overstate[d]” because it was “not central to the question of whether AT&T is liable for trade secret misappropriation.” *Id.* at 334. The court noted that the unavailability of privileged information did not prevent AT&T from defending itself in other ways, such as by showing that AT&T developed its own technology independently of its contacts with DTM. *Id.* Furthermore, the court held that dismissal was inappropriate even though “[t]he district court’s prohibition of discovery . . . may affect AT&T’s efforts to impeach” DTM witnesses. *Id.* Consistent with its prior decisions and those of other circuits, the court in *DTM Research* ultimately held that “the plaintiff’s case should be allowed to proceed, even if some otherwise relevant evidence might not be presented.” *Id.*

In contrast to *DTM Research*, the Fourth Circuit held in *Abilt v. CIA* that dismissal was warranted under the “proper defense” exception where a CIA employee who suffered from narcolepsy sued the agency for employment discrimination based on his disability. 848 F.3d at 309-10. The CIA was entitled to proffer a legitimate, non-discriminatory reason for its actions as a defense. *Id.* at 316. But, the court observed, the CIA was **entirely prevented** from doing so because it would “inescapably” reveal classified information in the process. *Id.* (“[B]ased on the nature of Abilt’s claims, virtually any reason the CIA could offer for its actions would require the disclosure of information about Abilt’s performance as a covert operative, the nature of the jobs he sought, the requirements of those jobs, the job performance of his colleagues, and/or the criteria used by the CIA to make assignments.”).

CACI claims that the Fourth Circuit’s *El-Masri* decision mandates dismissal here, but its reliance on that decision is misplaced. In *El-Masri*, the plaintiff sued the CIA Director and others for their direct role in devising the CIA’s secret “extraordinary rendition” program that led to plaintiff’s alleged torture—a proceeding that would put the very existence and detailed

operation of the entire clandestine program into the public domain through litigation of the most elementary aspects of the case. *El-Masri*, 479 F.3d at 311.¹⁵ In particular, the court noted that, given the particular nature of the plaintiff's claims, the defendants' main defenses would **require** the disclosure of classified information regarding the means and methods of CIA operations. *Id.* at 309-10. Those defenses were: "[1] to show that El-Masri was not subject to the treatment that he alleges; [2] that, if he was subject to such treatment, the defendants were not involved in it; or [3] that, if they were involved, the nature of their involvement does not give rise to liability."¹⁶ *Id.* at 310. The first defense, the Fourth Circuit stressed, "could be established only by disclosure of the actual circumstances of [plaintiff's] detention, and its proof would require testimony by the personnel involved." *Id.* ***But this is precisely the sort of evidence that CACI was able to obtain from the pseudonymous interrogators/interpreters who allegedly interacted with Plaintiffs.*** The Fourth Circuit also opined that, given the very nature of the extraordinary rendition program, privileged information would prevent the defendants from showing that *another* government entity, or foreign government, was the one responsible for El-Masri's abuse. *Id.* Again, that sort of information was disclosed to CACI in this case, as the United States allowed pseudonymous witnesses to testify regarding whether they were employed by CACI or

¹⁵ Critically, the United States itself made the determination in *El-Masri* that the litigation could not proceed and intervened in *El-Masri* to dismiss the case and protect state secrets. By contrast, here the United States has assessed that Plaintiffs' claims can proceed without implicating state secrets, and it has provided extensive discovery pursuant to protocols intended to protect against the disclosure of certain classified information.

¹⁶ Contrary to CACI's repeated suggestions, the Fourth Circuit never suggested that these defenses applied in *all* cases involving allegations of detainee abuse. Given Plaintiffs' theories of liability, CACI cannot defend against Plaintiffs' claims by arguing that it was not directly involved in Plaintiffs' abuse. CACI itself has previously conceded that Plaintiffs' conspiracy and aiding-and-abetting claims can be established "even if the defendant had no involvement with the actions that injured the plaintiff." See CACI Br. at 11 (Dkt. 222).

the U.S. Army when they served at Abu Ghraib, as well as every detail they could remember as to the “nature of their involvement” with Plaintiffs.

If anything, this case is more analogous to *Salim v. Mitchell*, another lawsuit involving claims of aiding-and-abetting torture asserted against government contractors. In *Salim*, the defendants—who allegedly devised a torture program that individual CIA officers deployed on plaintiffs—sought discovery related to CIA personnel on the theory that such evidence was necessary for defendants to demonstrate that the defendants were working within the CIA chain-of-command and also to “connect the dots” between the defendants and CIA personnel in order to establish the defendants’ lack of direct involvement with the plaintiffs, a similar strategy to the one CACI has deployed here. *See In re Mitchell & Jessen*, No. 16-MC-0036, Dkt. 78 at 2 (E.D. Wash.). Nevertheless, over the defendants’ objection, the government successfully invoked privilege over the evidence sought and the court ruled that the case could proceed absent such evidence. *See In re Mitchell & Jessen*, No. 16-MC-0036, Dkt. 91 at 15 (E.D. Wash.).

B. CACI Has Access to the Evidence It Needs for Its Main Avenues of Potential Defense

CACI’s first avenue of potential defense is to contest whether Plaintiffs were subjected to the war crimes, torture, and CIDT that they have alleged. CACI Br. at 15 (Dkt. 1042). CACI’s own brief shows that it has ample evidence that it could marshal in connection with this defense. *Id.* at 10-15. During the pseudonymous depositions, personnel who allegedly participated in Plaintiffs’ interrogations testified at length regarding their involvement in and knowledge of detainee abuse at Abu Ghraib, including any such abuse involving Plaintiffs. *See supra* Part A.2. CACI also has virtually unfettered access to most of the documents that it claims are relevant to

challenging Plaintiffs' allegations of abuse, such as interrogator notes.¹⁷ *See supra* Part A.1.

Finally, as part of its defense, CACI will have the opportunity to cross-examine Plaintiffs when their testimony is presented at trial regarding the nature of the harms they endured.

CACI's stated second avenue of potential defense is to challenge Plaintiffs' claim that CACI participated in the alleged conspiracy or otherwise aided and abetted Plaintiffs' torture. Again, CACI has access to ample non-classified evidence that it might seek to introduce in connection with this defense. CACI A and the other pseudonymous witnesses, for example, provided testimony on the following topics:

- The nature of their interactions with MPs, including those who were court-martialed in connection with the abuse of detainees at Abu Ghraib;
- Their knowledge regarding any detainee abuse that they witnessed at Abu Ghraib, including whether such abuse involved CACI personnel;
- Their recollection regarding how often they were present at the Hard Site, including during the night shift; and
- Whether they conspired with others to torture Abu Ghraib detainees or otherwise aided and abetted such torture.¹⁸

Furthermore, CACI has access to testimony from several MPs who were court-martialed for their involvement with detainee abuse at Abu Ghraib, including testimony concerning the nature of their interactions with CACI interrogators and CACI involvement in detainee abuse. (Decl. Ex. 9 at 71:11 – 82:9, 84:6 – 85:8, 90:19 – 92:24; *id.* Ex. 10 at 24:5 – 25:11, 35:17 – 38:12, 49:22 –

¹⁷ A review of the interrogator notes confirms that CACI overstates their importance to its defense. The notes only described in summary fashion what purportedly occurred during interrogations. Moreover, as CACI A readily acknowledged, these notes were often revised by personnel in the Interrogation Control Element after they were submitted by interrogators. (Decl. Ex. 13 at 199:17 – 21.) Finally, it is implausible that interrogators would record instances of detainee abuse in their notes after an interrogation. As to the interrogation plan located in Al Shimari's detainee file, likewise one would not expect such formal documents to memorialize any intent to mistreat detainees. CACI A readily admitted that "the whole idea was to improvise" during interrogations and that he was not required to strictly follow interrogation plans that had been prepared in advance of an interrogation. (*Id.* at 177:6 – 13.)

¹⁸ *See supra* Part A.2 and sources cited at note 7.

50:11.) In addition, CACI has access to the testimony that it elicited from General Taguba regarding his report and its findings implicating CACI personnel in detainee abuse.¹⁹ Finally, nothing stops CACI from calling its own present and former employees in its efforts to rebut Plaintiffs' conspiracy and aiding-and-abetting allegations.

C. CACI's Purported Secondary Defenses Are Not Viable and Their Validity Does Not Depend on the Evidence Withheld by the United States

The Court also should not dismiss this case based on CACI's contention that the state secrets privilege prevents it from fairly presenting its additional defenses premised on derivative sovereign immunity and the borrowed servant doctrine. CACI Br. at 26-28 (Dkt. 1042).

First, dismissal would be inappropriate because neither of these defenses is "valid" under the facts of this case. As the DC Circuit explained in *In re Sealed Case*, dismissal under the "proper defense" exception is appropriate only where "the defendant will be deprived of a *valid* defense based on the privileged materials." 494 F.3d at 149 (emphasis added); *accord Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). Not every defense that a defendant espouses is valid. Rather, a valid defense is one that "is meritorious and not merely plausible and would require judgment for the defendant." *In re Sealed Case*, 494 F.3d at 149. There is good reason for this limitation. If the exception were "expanded to mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege

¹⁹ The United States did not prevent General Taguba from answering any of CACI's questions during his deposition on the ground that his answer would be classified. (*See generally* Decl. Ex. 28.)

would need to be dismissed.” *Id.* at 149-50. “This would mean abandoning the practice of deciding cases on the basis of evidence . . . in favor of a system of conjecture.” *Id.*

Here, CACI’s claimed derivative immunity defense is not meritorious and therefore not valid. A government contractor is not entitled to derivative immunity in connection with conduct that violates federal law. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016); *Cunningham v. Gen. Dynamics Info. Tech.*, 888 F.3d 640, 647 (4th Cir. 2018). Plaintiffs’ claims are premised on allegations of torture, CIDT, and war crimes. These are all prohibited under federal law. *See Al Shimari v. CACI Premier Tech., Inc.*, 263 F. Supp. 3d 595, 600-06 (E.D. Va. 2017); *see also* 18 U.S.C. § 2340A; *id.* § 2441; 28 U.S.C. § 1350. Accordingly, CACI cannot shelter itself from liability under the derivative immunity doctrine if it is found liable in connection with Plaintiffs’ claims of torture, CIDT, and war crimes.

Similarly, CACI’s borrowed servant defense is not valid under the facts of this case. A defendant can avail itself of this defense only when its employees are “wholly free from the control” of the defendant and “wholly subject to the control of the second employer.” *Williams v. Shell Oil Co.*, 18 F.3d 396, 400 (7th Cir. 1994); *accord White v. Bethlehem Steel Corp.*, 222 F.3d 146, 149 (4th Cir. 2000); *Minnkota Power Coop., Inc. v. Manitowoc Co.*, 669 F.2d 525, 532 (8th Cir. 1982) (“A total shift in liability does not occur, however, when the servant simultaneously performs an act which falls within the scope of employment for both the general employer and the borrowing employer.”). This purported defense is not applicable here because undisputed evidence confirms that CACI did not (and could not) relinquish control over its personnel. CACI’s statement of work with the government expressly stated that CACI was [REDACTED] (Decl. Ex. 29 at AS-USA-052481.) Moreover, as to Plaintiffs’ allegations of unlawful conduct, CACI interrogators had the

right (and, indeed, the obligation) to refuse to participate in such abuse even if such a refusal was contrary to a military order. (*Id.* Ex. 13 at 201:5 – 10.)

Second, even if CACI's secondary defenses were viable, dismissal would be inappropriate because the information CACI alleges to be essential has no bearing on these defenses. As to both defenses, CACI claims it needs unfettered access to two documents that it speculates are purportedly relevant to whether the United States authorized the torture and CIDT that Plaintiffs' endured—an interrogation plan in Al Shimari's detainee file and a small portion of the interrogator notes related to the third documented interrogation of Al Zuba'e.²⁰ CACI Br. at 27 (Dkt. 1042). But none of that material "discusses or describes the use of . . . techniques not authorized by Army Field Manual ("FM") 34-52," such as torture and CIDT. (Decl. Ex 2 ¶ 3; *id.* Ex. 30 at CACI21015.) This is unsurprising, as it is implausible that interrogator notes and interrogation plans would have memorialized unlawful conduct related to the interrogations of Al Shimari and Al Zuba'e.²¹ The significance of these materials is further diminished because Plaintiffs' claims are largely premised on abuse that occurred at the hands of MPs outside of interrogations. Finally, none of these documents has any relevance to the borrowed servant issue of whether CACI relinquished control of its employees.

Third, even if privileged information were relevant to CACI's secondary defenses and those defenses were viable, dismissal would still be inappropriate because CACI has access to

²⁰ CACI also complains that its borrowed servant defense is impaired because it was unable to develop testimony regarding the "identity of section leaders [allegedly] overseeing the work of interrogators." CACI Br. at 28 (Dkt. 1042). That contention is a red herring. Although in some instances the United States may have prevented witnesses from testifying regarding the *specific* identity of such section leaders, CACI could have obtained testimony regarding whether such section leaders were employees of CACI or the United States.

²¹ Moreover, as this Court has recognized, it is not simply a list of techniques that is relevant to assessment of Plaintiffs' torture and CIDT claims, but how frequently and in what combination those techniques were used. *Al Shimari v. CACI Premier Tech.*, 324 F. Supp. 3d 668, 688-93 (E.D. Va. 2018).

plenty of other evidence that it could seek to use in connection with these defenses. For example, pseudonymous witnesses were permitted to testify regarding their preparation for interrogations, including whether they prepared and followed interrogation plans that were approved by the military, and any military oversight of the interrogation process. *See supra* Part A.2. CACI also has access to testimony from current and former military officers concerning these matters. *See* Dec. 20, 2018 O'Connor Decl. Exs. 22, 24, 25 (Dkt. 1045).

III. THE GOVERNMENT'S PRIVILEGE ASSERTION DOES NOT IMPEDE CACI IN ANY CREDIBILITY BATTLE, NOR DOES IT PREVENT CACI FROM RESPONDING TO THE GENERALS' REPORTS

A. CACI Is Not Disadvantaged in Any Credibility Battle Concerning Trial Witnesses

Crying prejudice, CACI contends that invocation of the state secrets privilege disadvantages it at trial in any "credibility battle" because the interrogators assigned to question Plaintiffs at Abu Ghraib will have to testify either in disguise or by deposition. CACI Br. at 16-18 (Dkt. 1042). That argument is meritless.

First, the privileged nature of the identities of pseudonymous witnesses does not prevent CACI from calling these witnesses to testify live at trial. The United States has produced these witnesses for depositions and CACI can only speculate that it would be unable, or unwilling, to produce these same witnesses for trial.²²

Second, the possible need to implement processes to protect the identities of pseudonymous witnesses at trial is not unprecedented, nor would it require dismissal of this case. *See James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (recognizing that "under appropriate circumstances anonymity may, as a matter of discretion, be permitted" at trial). As the Court has

²² For the government's position regarding this issue, Plaintiffs' respectfully refer the Court to the United States' response to CACI's motion to dismiss. *See* U.S. Response, at 3-4 (Dkt. 1068).

previously acknowledged, it has implemented such protocols in criminal cases where the importance of ensuring proper due process protections is much higher. (Decl. Ex. 31 at 6-7.)

Third, even if the pseudonymous witnesses (or any other witnesses) cannot be produced to testify at trial, their deposition testimony can be presented to the jury in place of live testimony, as is routinely done. Such testimony would be entitled to just as much weight as testimony presented by live witnesses. *See Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 259 (5th Cir. 1985) (“A trial court may not properly instruct a jury that a written deposition is entitled to less weight than live testimony.”); 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2143, at 458 (1971) (“[D]epositions, when admissible, are not to be treated as a form of second-class evidence.”). It is remarkable for CACI to suggest that dismissal is required because of the potential need to use an otherwise standard method for presenting witness testimony at trial.

Fourth, contrary to CACI’s suggestion, the United States’ privilege assertion did not prevent CACI from eliciting testimony from the pseudonymous witnesses that could potentially bolster their credibility. In most instances CACI was able to determine (1) whether the witnesses had ever been court-martialed or subjected to nonjudicial punishment; (2) whether the witnesses had ever been disciplined or reprimanded by the Army for anything that happened at Abu Ghraib; (3) whether the witnesses had ever been convicted of a crime; and (4) whether the witnesses had ever received any medals or awards while in the army. *See supra* Part A.2. As to the first three of those topics, the United States prevented witnesses from answering only to the extent the answer was something other than “no.” Such testimony was beneficial to only one party—CACI. By contrast, in the instances where the answer to those questions was anything

other than a negative response, it was *Plaintiffs* who were denied information that could potentially support their claims.

Fifth, even if the privilege prevents CACI from discovering certain information potentially relevant to the credibility of the pseudonymous witnesses, CACI's argument assumes that such information would be helpful to its defense. But it is just as likely that the privileged information sought by CACI would be helpful to *Plaintiffs* in challenging the credibility of the pseudonymous witnesses who disclaimed any involvement in or knowledge of detainee abuse. CACI's speculation regarding what the privileged evidence *might* reveal cannot justify dismissal. *In re Sealed Case*, 494 F.3d at 151 (the unavailability of evidence "is not an occasion to dismiss complaints on the basis of speculation about what the lost evidence might have suggested"). CACI's cross-examination of Plaintiffs will be unimpeded by the United States' invocation of the state secrets privilege.

B. CACI Is Not Prevented from Responding to the Findings in the Generals' Reports Implicating CACI in Detainee Abuse

CACI also argues that dismissal is required because the state secrets privilege supposedly prevents it from fairly responding to evidence from the Generals' Reports. Not so. CACI obtained extensive testimony from General Taguba regarding his investigation and report, and it has not suggested that such testimony will be unavailable at trial. CACI could also seek to challenge the findings of the Generals' Reports by calling as trial witnesses each of the CACI interrogators identified in the reports as having participated in detainee abuse. CACI may be contemplating just that, as its Rule 26 disclosures list its three employees who were called out in the reports for ordering abuse of detainees—Tim Dugan, Dan Johnson, and Steve Stefanowicz—as potential trial witnesses. Defendant's Rule 26(A)(3) Disclosures, at 3 (Dkt. 971).

CACI's contention that dismissal is warranted because it cannot present evidence that CACI A or G were not implicated in the Generals' Reports is also meritless. That argument again rests on the speculative assumption that those interrogators are *not* the ones implicated in the reports. And even if that assumption were true, CACI is not prevented from defending itself absent this information. Furthermore, any purported prejudice related to this issue applies equally to Plaintiffs, who are prevented from potentially presenting evidence that CACI A and G *are* the individuals implicated in the Generals' Reports. (*See* Decl. Ex. 13 at 14:15 – 15:2.)

IV. ANY PURPORTED PREJUDICE ARISING FROM THE PRIVILEGE ASSERTION AFFECTS PLAINTIFFS AS MUCH OR MORE THAN IT AFFECTS CACI

CACI's protest that the privilege paralyzes its defense is not only exaggerated on its own terms, but also ignores that the concealment of interrogator identities potentially prejudices Plaintiffs. CACI is not entitled to special treatment when it comes to the unavailability of privileged information. *See Farnsworth Cannon, Inc.*, 635 F.2d at 271-73 (“The unavailability of the evidence is a neutral consideration, and, whenever it falls upon a party, that party must accept the unhappy consequences. . . . Hence, in order that the parties may be treated evenhandedly it is crucial that neither party be preferred, that neither be given an advantage because of the inaccessibility of evidence on privilege grounds.”).

A. Plaintiffs Were Denied the Ability to Develop Evidence That Could Be Used to Impeach the Testimony of the Pseudonymous Witnesses

Most notably, the state secrets privilege prevents Plaintiffs from uncovering facts that could be used to impeach the credibility of pseudonymous witnesses, including CACI A and G.²³

²³ Plaintiffs were also denied the opportunity to ask CACI A about matters that go to establishing their claims against CACI, including regarding his qualifications (or lack thereof) at the time he was hired by CACI. (Decl. Ex. 13 at 131:1 – 18.)

For example, Plaintiffs were denied discovery regarding CACI A's criminal history and whether he had been subjected to punishment by the military. (Decl. Ex. 13 at 13:20 – 14:5.) Plaintiffs were also prevented from probing the scope and nature of any relationships between CACI and the pseudonymous witnesses. For example, the United States did not permit CACI A to answer questions regarding the duration of his employment with CACI or the circumstances of his departure. (*See id.* at 10:16 – 11:1, 125:15 – 127:1.) Such evidence would have been potentially helpful to Plaintiffs in revealing witness bias. Moreover, Plaintiffs have no way of learning whether any of the pseudonymous interrogators who were employed by the Army during the relevant time period are current CACI employees, which may also bear on their potential bias.²⁴ Plaintiffs were also prevented from learning whether the pseudonymous witnesses had previously given statements to the military in connection with the various investigations into detainee abuse. This denied Plaintiffs an opportunity to obtain and use any such statements as potential impeachment material to the extent the witnesses' testimony deviated from those prior statements.

B. CACI Has Access to Potentially Useful Information, Including Classified Information, That Is Unavailable to Plaintiffs

One of the core premises of CACI's prejudice argument is the fact that the identity of CACI A is classified. But left unsaid is the fact that CACI *knows* CACI A's identity and the fact that it was able to meet with CACI A for a prep session to preview questions and answers before CACI took his deposition for this case. *See supra* Part A.2. CACI's knowledge of CACI A's identity also undoubtedly allowed it to rely on records from its "privileged" internal investigation

²⁴ There is a distinct chance that this may be true as CACI employs a substantial number of people who used to work in the armed forces. (*See id.* Ex. 32 (“[V]eterans comprise more than one-third of CACI employees.”).)

in order to prepare for the deposition. By contrast, when Plaintiffs learned that CACI was aware of CACI A's identity, they asked the United States to disclose CACI A's identity to them as well in the interest of fairness but the United States refused. (Decl. Ex. 14.) Accordingly, the privilege assertion over CACI A's identity has afforded CACI a distinct advantage in connection with the development of his testimony for this case. This is highly prejudicial to Plaintiffs, particularly given CACI A's connection to Plaintiff Al Shimari as his assigned interrogator.

Furthermore, CACI's access to purportedly privileged records from its internal investigation into the Abu Ghraib scandal also provides it with a distinct advantage over Plaintiffs in developing the evidentiary record prior to and during trial. *See supra* Part C. Beyond its selective and self-serving use of the investigation for public relations purposes, CACI has been able to rely on this evidence to pursue investigative leads during discovery and prepare for the depositions of the pseudonymous witnesses, MPs, and military officers. It will be able to rely on this material in preparing its witnesses for trial, including, potentially, the CACI interrogators who were implicated in the Taguba and Jones/Fay Reports.²⁵ CACI has also been able to take advantage of its investigation records in support of its relentless efforts to undermine the credibility of General Taguba and his report. Plaintiffs have access to none of the records from CACI's investigation, thereby putting them at an additional disadvantage relative to CACI. In sum, considered on a comparative basis *vis a vis* Plaintiffs, CACI has been the beneficiary, not the victim, of the government's invocation of the state secrets privilege.

²⁵As CACI has acknowledged, its investigation allegedly allowed its counsel at Steptoe to make judgments regarding the credibility of CACI's interrogators and to examine gaps or inconsistencies in the various accounts. (Decl. Ex. 24 at 396.) CACI will be able to use this information to decide which of its interrogators to call as trial witnesses.

V. THE POTENTIAL RELEVANCE OF PRIVILEGED INFORMATION TO CACI'S OTHER EFFORTS TO EVADE LIABILITY DOES NOT WARRANT DISMISSAL

A. The United States' Privilege Assertion Has No Bearing on the Court's Prior Ruling That Plaintiffs' Claims Are Justiciable

CACI's contention that it needs access to privileged information to file yet *another* motion challenging subject matter jurisdiction, CACI Br. at 25-26 (Dkt. 1042), is a transparent attempt to relitigate issues that have already been decided by the Court. The Court has already held that Plaintiffs' claims alleging torture, CIDT, and war crimes are justiciable after a review of the evidence. *See Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668 (E.D. Va. 2018). The Court's prior ruling is the law of the case and there have been no subsequent developments that would call into question that ruling, particularly in light of the Fourth Circuit's holding that "conduct by CACI employees that was unlawful when committed is justiciable." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 151 (4th Cir. 2016). The Court should not reopen this issue despite CACI's urging. *See, e.g., Va. Innovation Scis., Inc. v. Samsung Elecs. Co.*, 983 F. Supp. 2d 713, 762 (E.D. Va. 2014) (courts should not revisit prior decisions absent "extraordinary circumstances" suggesting that the decision was "dead wrong").

B. Granting Dismissal Because of the Potential Relevance of Privileged Information to CACI's Strategically Asserted Third-Party Claims Would Be Unprecedented and Unwarranted

The Court should also reject CACI's attempt to dismiss Plaintiffs' claims in light of its strategic assertion of third-party claims against certain John Doe defendants. There is no relief CACI could obtain against those individuals that it cannot obtain against the United States as third-party defendant. CACI's decision to file its third-party complaint against individuals whose identity it knew the United States would not disclose—doing so *more than ten years after the start of this case* and only after its serial attempts at dismissal failed—was an obvious attempt

to strategically assert new claims that it could try to leverage to obtain dismissal and avoid liability under Plaintiffs' conspiracy and aiding-and-abetting theories. But CACI has not identified a single authority, nor have Plaintiffs been able to find one, supporting the contention that dismissal of a plaintiff's claims is warranted where the assertion of the state secrets privilege potentially affects a defendant's ability to bring related third-party claims. This is not one of the three grounds recognized in Fourth Circuit law where dismissal is warranted due to invocation of the state secrets privilege. *Abilt*, 848 F.3d 313-14.

CACI's argument also disregards the fact that its purported inability to bring claims against the John Does impacts Plaintiffs in precisely the same way. If the privilege assertion prevents CACI from bringing claims against the John Does, then it also prevents Plaintiffs from doing so. At bottom, the assertion of the state secrets privilege presents an evidentiary matter that should not alter the "usual rules for dealing with nonadmissible material." *Farnsworth Cannon, Inc.*, 635 F.2d at 270. Here, both Plaintiffs and CACI bear the consequences of the assertion of the privilege. CACI's request for dismissal flouts the notion that the parties be treated "evenhandedly" without one being "given an advantage because of the inaccessibility of evidence on privilege grounds." *Id.* at 273.

CONCLUSION

For all of the foregoing reasons, CACI's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I electronically filed Plaintiffs' Opposition to Defendant's Motion to Dismiss Based on the State Secrets Privilege as well as the Buszin Declaration and accompanying exhibits through the CM/ECF system, which sends notification to counsel for Defendants and the United States. A copy of the version of this memorandum and the exhibits filed under seal will also be sent by email on the same date to the below-listed counsel.

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